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No. 247

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In the Supreme Court of the United States

OCTOBER TERM, 1969

JESSE EARL MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A; VII R, 1-12)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1969 (Pet. App. B; VII R, 13). The petition for a writ of certiorari was filed on June

[1] The record is in seven volumes on file before this Court.

16, 1969 and is thus out of time under the Rules of this Court, Rule 22. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's motion for severance was properly denied.

RULES INVOLVED

Rule 8 of the Federal Rules of Criminal Procedure provides:

> (a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may

order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *

STATEMENT

Petitioner is one of twenty defendants jointly charged with committing numerous burglaries of United States post offices and other offenses related to the burglaries in an indictment filed on March 31, 1967, in the United States District Court for the Western District of Missouri. Count I alleged that the defendants (including petitioner) and eight co-conspirators not named as defendants entered into a conspiracy which began in October, 1964, in violation of 18 U.S.C. 371, to commit offenses in violation of 18 U.S.C. 641 (stealing public money), 18 U.S.C. 2115 (burglary of a post office) and 18 U.S.C. 1361 (depredation of government property). The remaining 36 counts alleged substantive offenses (I R, 1-55).

1. Petitioner was tried together with a co-defendant Holland, who was charged only in the conspiracy count (III R, 521). Petitioner, in addition to being charged as a conspirator, was charged with four substantive offenses arising out of two burglaries on February 16 and May 10, 1965.[2] Petitioner was found guilty as charged (III R, 520) and, on Febru-

[2] Count VI—burglarizing the post office at Camdenton, Missouri, on February 16, 1965; Count VII—wilfully damaging government property in that post office; Count XV—burglarizing the Maryville, Missouri, post office on May 10, 1965; Count XVI—wilfully damaging government property in that post office (I R, 29, 35).

ary 23, 1968, was sentenced to imprisonment for a total period of fifteen years.[3]

Petitioner had previously been tried alone on all five counts in which he was named, but the court had refused to order separate trials on the various counts in which he was charged. After a jury verdict of guilty, the trial judge granted a new trial because of error in the instructions, and transferred the cases of petitioner and Holland to Judge Collinson (Pet. App. A-5).

After his case had been transferred, petitioner again moved for severance of the various counts (II R, 416). In denying the motion Judge Collinson stated (III R, 454):

> [T]he case has been tried once without a severance and the preceding trial judge specifically found that the joinder was not prejudicial after hearing all the counts tried together. All of the cases hold that the trial court shall grant a severance at any stage of a trial if prejudice does appear. The experienced trial judge who tried this case before did not find this prejudicial and this is very persuasive upon this Court.

Petitioner's counsel, who also represented Holland, orally moved for severance of the two defendants at the commencement of the trial, and again requested severance of the counts against petitioner (IV R, 10-11). In denying the motions, Judge Collinson stated (IV R, 13):

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[3] He was sentenced to imprisonment for five years on each of Counts I, VI, XV and XVI, to be served concurrently and ten years on Count VII to be served consecutively to the other sentences (III R, 622).

> Now, the two * * * motions for severance will be denied at this time subject to being renewed under the [applicable] rules and cases * * * during the course of trial, if the Court thinks there is something prejudicial in the joinder of either of the defendants or of the counts.

At no time thereafter were the motions renewed.

2. The evidence at trial showed that the conspiracy began in October 1964. Christenson and Conway, who were witnesses for the government, testified that in the period from October 1964 to February 1965 they had burglarized seven post offices and had established a fencing arrangement for disposition of stolen stamps with Paustian and Taylor of Manhattan, Kansas (IV R, 168, 212-216; V R, 308, 314).

Christenson met petitioner in St. Louis on February 16, 1965 (IV R, 165-166, 27). Christenson testified (IV R, 165):

> Miller [petitioner] and I had a short conversation after we met. He said he wanted to make some money. I said well, I needed to make some, too. I asked him if he had ever been in any post office burglaries he said no, he hadn't. I said, "Do you want to go on one?" He said, "Yeah". So we decided to leave, we left a few days later, we left St. Louis about noon one day. We drove down through—went out Route 66 and drove through eight or ten towns, looking for post offices. Finally came across one in Camdenton, Missouri, about seven or seven thirty that night. We decided to burglarize it.

After the Camdenton burglary they drove to Springfield, Missouri, registered at a motel, sorted the

stamps and money and left immediately to meet Taylor in Manhattan, Kansas, in accordance with Christenson and Conway's previous arrangements (IV R, 167-168). Christenson testified that the following conversation occurred in petitioner's presence at Taylor's pawn shop (IV R, 169):

> I told him [Taylor] we had a load of stamps and he said well, he didn't have enough money right now to buy them. He said, "At the rate you guys are stealing them"—he said, "I better take you to Kansas City and introduce you to the man that I am buying them for." So we said, "Okay".

When petitioner and Christenson met Taylor and Paustian in Kansas City, they were introduced to defendant Bradley who purchased about $16,000 worth of the stamps stolen at Camdenton and offered to continue to purchase stolen postage (V R, 169-171).

On May 10, 1965 petitioner, along with Christenson, Conway, Wright and Hanrahan burglarized the Maryville, Missouri, Post Office (IV R, 53, 182-183; V R, 241, 294-295, 306). Petitioner brought Hanrahan and Wright into the conspiracy shortly before the Maryville burglary (IV R, 230; V R, 240-241).

At various dates during March, May and July 1965 petitioner participated in burglaries of post offices at Sesser, Illinois (IV R, 77-78, 174; V R, 258); Bedford, Iowa (IV R, 84-85, 177; V R, 260); Hamburg, Iowa (IV R, 89-90, 184; V R, 244, 296, 307); Menahga, Minnesota (IV R, 95, 186); Bourbon, Missouri (IV R, 101-102, 189; V R, 262); and at Millstadt, Illinois (IV R, 105, 192; V R, 276-277). Co-defend-

ant Holland participated in the burglaries at Bourbon, Missouri, and Menahga, Minnesota (IV R, 186-192).

3. As part of its final charge the court instructed the jury as follows (VI R, 520):

> A separate offense is charged against each of the defendants in Count I of the indictment. This is important. They are each charged with a separate offense, and the defendant Miller is charged with separate and distinct offenses in each of Counts VI, VII, XV, and XVI. You must make a separate finding as to each defendant and each charge based only on the evidence pertaining to that defendant and that charge. The fact that you may find one defendant guilty or not guilty of the offense with which he is charged should not influence your verdict as to any other offense with which that defendant is charged, nor should it influence your verdict in any way as to any offense with which the other defendant is charged.

ARGUMENT

As noted above, the petition is out of time under Rule 22. At all events, the issues raised by petitioner do not warrant further review.

The trial court properly denied petitioner's motions for a severance of the conspiracy charge and the substantive charges relating to the Camdenton and Maryville burglaries. It is well settled that a conspiracy count may properly be joined with counts charging substantive offenses committed in the course of the conspiracy.[4] *Schaffer* v. *United States*, 362

[4] Petitioner does not press any claim that he was prejudiced by being tried jointly with Holland.

U.S. 511, 514; *Baker* v. *United States*, 393 F. 2d 604, 607 (C.A. 9), certiorari denied, 393 U.S. 836; *United States* v. *Hensley*, 374 F. 2d 341, 352 (C.A. 6), certiorari denied, 388 U.S. 923.

Petitioner argues that the evidence did not show that, when he agreed to join in the Camdenton burglary, he knew that he was joining a larger conspiracy and hence that he was prejudiced by having counts VI and VII, which depended on Christenson's testimony alone, tried with other counts where there was more corroboration. It is evident, however, from Christenson's testimony that petitioner knew that Christenson had been in post office robberies before and that after joining in the robbery, petitioner willingly accepted the arrangements previously made for disposal of the loot. Thus, at the time he joined the conspiracy he adopted the prior arrangements of his conspirators (see *Blumenthal* v. *United States*, 332 U.S. 539, 557) and he, thereafter, participated in a series of burglaries pursuant to that conspiracy. The various counts were therefore properly joined.

The instant case is clearly distinguishable from *Drew* v. *United States*, 331 F. 2d 85 (C.A.D.C.), and *Cross* v. *United States*, 335 F. 2d 987 (C.A.D.C.), where the charges joined for trial were not based upon acts or transactions constituting part of a common scheme or plan. Petitioner appears to argue, on the basis of *Cross*, that he wished to testify as to the Camdenton charges only but was unable to do so safely because of the other charges. Petitioner failed, however, to make such a claim in the district court.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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